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In The

Supreme Court of the United States

TECK COMINCO METALS LTD.,

Petitioner,

v.

JOSEPH A. PAKOOTAS, DONALD R. MICHEL, and the STATE OF WASHINGTON,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF *AMICI CURIAE* THE CANADIAN CHAMBER OF COMMERCE AND THE MINING ASSOCIATION OF CANADA IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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INTEREST OF *AMICI CURIAE*

The Canadian Chamber of Commerce ("CCC") and the Mining Association of Canada ("MAC") submit this joint *amici curiae* brief in support of the Petition for Writ of Certiorari filed by Petitioner Teck Cominco Metals, Ltd. ("Teck Cominco").[1]

Since 1925, the CCC has been Canada's largest business association, with approximately 170,000 members doing business in all parts of Canada. The CCC closely follows U.S.-Canada relations and all transborder issues, because of the integrated nature of the North American economy, and because many of its members have operations in both countries, and own or operate facilities located near the U.S.-Canada border.

The MAC represents Canadian mining companies engaged in mineral exploration, mining, smelting, refining, and semi-fabrication. As with the CCC, many of the MAC's members own or operate facilities located near the U.S.-Canada border, or adjacent to cross-boundary bodies of water.

Trans-border environmental matters, like the one here, raise serious concerns. However, the issue is not *whether* such questions need to be dealt with (they do), but *how* to do so. *Amici* submit there is a long history of the U.S. and Canada and the U.S. and Mexico dealing with such situations by inter-governmental agreements and not

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[1] Letters reflecting the written consent of the parties to the filing of this brief have been filed with the Clerk of the Court.

Counsel for the other parties did not author this brief in whole or in part. No person or entity, other than the CCC and the MAC, made a monetary contribution to the preparation and submission of this brief.

by private litigation like this case. Absent any indication of Congressional intent to sweep aside this century-old way of dealing with trans-border environmental concerns (and there is none), the Ninth Circuit erred in doing so.

The CCC and MAC support Teck Cominco's Petition because the Ninth Circuit's extraordinary opinion reaches a troubling result affecting any U.S. or Canadian business operating in the U.S.-Canada border region. Under its logic, Canadian businesses will be vulnerable to suit by private litigants under the U.S. Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA") – *even if those Canadian businesses operate entirely in Canada, and in full compliance with Canadian environmental and regulatory legal requirements.* This is truly unprecedented, because it is the "first case ever" to reach such a result. Austen L. Parrish, *Trail Smelter Déjà Vu: Extraterritoriality, International Environmental Law, and the Search for Solutions to Canadian-U.S. Transboundary Water Pollution Disputes*, 85 B.U. L. REV. 363, 367 (2005) (citing *Washington State Tribe Sues Canada Smelter Over Pollution*, Dow Jones Int'l News, Jul. 22, 2004)).

The Government of Canada has protested the enforcement of U.S. environmental laws on Canadian businesses operating lawfully and solely in Canada, because such enforcement violates Canadian sovereignty. *See* Government of Canada's *Amicus Curiae* Brief in Support of Appellant and for Reversal of the Order of the District Court. As stated in its Ninth Circuit *amicus* brief, "[t]he Government of Canada has a strong interest in preserving from interference, by private litigation in United States courts, its sovereign right to regulate Canadian persons and companies operating in Canada." *Id.* at 3-4. It has also warned that allowing this litigation to proceed would

likely result in retaliatory litigation against U.S. businesses operating in the United States for violations of *Canadian* environmental laws. ER at 72. These prospects cause grave concern to all Canadian and U.S. businesses operating on either side of the U.S.-Canada border, including *amici*'s members.

However, the Ninth Circuit's broad ruling does not apply only to Canadian businesses. Its logic applies just as easily to businesses located in Mexico – such as the thousands of companies operating near the U.S. border under the Mexican government's "Maquiladora" program – or even to businesses operating *outside* North America, if their facilities cause any effects in the United States, such as through global air pollution flows. *See, e.g.*, Randolph E. Schmid, *Asian Air Pollution Generates Stronger Storms Over Pacific*, USA Today, Mar. 6, 2007 (reporting on National Academy of Sciences study, finding that air pollution in Asia generates "climactically significant" storms in the North Pacific). Indeed, it is difficult to see how the Ninth Circuit's decision could be limited. Using the Ninth Circuit's approach, any business lawfully operating anywhere in the world could theoretically come within CERCLA's reach, if pollution emitted from that business had environmental effects in the United States.

Subjecting economic activity occurring wholly in other countries to the vagaries of U.S. court litigation without any showing that Congress intended this – and there is no evidence of such intent here – could significantly impact the conduct of business. It would insert legal unpredictability into normal business arrangements, undermine business and regulatory certainty, and force companies operating solely and lawfully in their home countries also

to consider whether they might be ensnared in U.S. litigation under U.S. law.

Such a rule would also interfere with the ability of countries such as the United States, Canada, and Mexico to structure their foreign and economic policies through government-to-government agreements. These three countries – all parties to the North American Free Trade Agreement ("NAFTA") – have, for a century, relied on mechanisms for airing, managing or resolving trans-border environmental issues on a government-to-government basis, *e.g.*, the Boundary Waters Treaty of 1909 and the International Joint Commission, or the NAFTA Commission on Environmental Cooperation. These mechanisms have been repeatedly and successfully used by these governments to deal with trans-border environmental disputes and issues, rather than relying on lawsuits by private litigants that serve the litigants' private interests. These agreements and approaches have provided certainty to the business community in each country.

Nevertheless, the Ninth Circuit brushed this history of North American inter-governmental cooperation aside – indeed, essentially ignored it – and has created an alarming scenario where private litigation will become the primary means of resolving trans-border environmental disputes. This is the wrong result – especially when Congress has never indicated it wants this outcome. Given the vital importance of this issue and the unprecedented nature of the Ninth Circuit's opinion, *amici* support Teck Cominco's Petition for a Writ of Certiorari, and urge the Court to grant it.

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REASONS WHY THE PETITION SHOULD BE GRANTED

"North America constitutes a vast and interconnected system – physically, ecologically, and economically." Jameson Tweedie, *Transboundary Environmental Impact Assessment Under the North American Free Trade Agreement*, 63 WASH. & LEE L. REV. 849, 857 (2006). Indeed, almost 90% of Canada's population lives within 100 miles of the U.S. border. Parrish, *supra*, at 385 (citing Rebecca Jannol et al., *Migration Policy Institute, U.S.-Canada-Mexico Fact Sheet on Trade and Migration* 1, 1 (2003)). Thus, most Canadian economic activity takes place within that 100 mile border region.

An enormous amount of economic activity is similarly concentrated in the U.S.-Mexico border region, which began developing in 1965 with the institution by the Mexican government of the "Maquiladora" program – part of the Mexican government's larger "Border Industrialization Program" ("BIP"). U.S. General Accounting Office, *Mexico's Maquiladora Decline Affects U.S.-Mexico Border Communities and Trade; Recovery Depends in Part on Mexico's Actions*, July 2003, at 5. The enactment of NAFTA in 1994 has only increased the economic integration of the U.S.-Mexico border communities, and the two countries' economies.

As a result of economic activities near and across their respective borders, the United States, Canada, and Mexico "'have a lot of trans-boundary environmental problems.'" Tweedie, *supra*, at 857 (quoting John Knox, *Federal, State and Provincial Interplay Regarding Cross-Border Environmental Pollution*, 27 CAN.-U.S. L.J. 199, 199 (2001)). The United States and Canada alone "'share an extensive border

that includes some 150 rivers and lakes – a situation that has "provided ample opportunity for the generation of international environmental disputes."'" Parrish, *supra*, at 383-84 (quoting Joel A. Gallob, *Birth of the North American Transboundary Environmental Plaintiffs: Transboundary Pollution and the 1979 Draft Treaty for Equal Access and Remedy*, 15 HARV. ENVTL. L. REV. 85, 132-33 (1991)). *See also generally* Randall S. Abate, *Dawn of a New Era in the Extraterritorial Application of U.S. Environmental Statutes: A Proposal for an Integrated Judicial Standard Based on the Continuum of Context*, 31 COLUM. J. ENVTL. L. 87, 131-32 (2006) (discussing a variety of currently brewing transboundary environmental disputes).

For more than a century, the North American countries have dealt comprehensively with trans-boundary environmental issues *solely* through diplomatic and intergovernmental means. On issue after issue – from acid rain, to solid waste, to sewage dumping, to pollution emanating *from the very smelter at issue in this case* (the "Trail Smelter") – the governments of the United States, Canada, and Mexico have endeavored to solve disagreements and difficulties collaboratively and cooperatively, in the common interest of the North American countries. These diplomatic efforts have included such mechanisms as the International Boundary Commission (established in 1889) (U.S.-Mexico), the International Waterways Commission (established in 1905) (U.S.-Canada), the Boundary Waters Treaty of 1909 and its International Joint Commission (U.S.-Canada), the U.S.-Mexico Water Treaty of 1944, creating the International Boundary and Water Commission, the Great Lakes Water Quality Agreement of 1978 (U.S.-Canada), the La Paz Agreement of 1983 (U.S.-Mexico), the

Border 2012 effort (U.S.-Mexico), and the NAFTA "Side Agreement" on Environmental Cooperation (U.S.-Mexico-Canada), which included creation of the NAFTA Commission on Environmental Cooperation. In short, the fact of inter-governmental cooperation and joint management on environmental issues is well established and fully operational. This has produced far more progress, substantive results, and business stability than would have a situation where progress and resolution of issues could only be made through litigation.

These diplomatic and inter-governmental mechanisms for regulating, managing or solving trans-boundary environmental issues have served the North American countries well. Indeed, the International Joint Commission ("IJC") created by the U.S.-Canada Boundary Waters Treaty of 1909 was instrumental in resolving one of the most contentious trans-boundary environmental disputes of the 20th century – a dispute that arose from the very same smelter at issue in this case. The so-called "Trail Smelter" proceedings – a bi-national dispute adjudicated under the IJC – which resulted in the Canadian government agreeing to compensate U.S. farmers and others for damages caused by air pollution emanating from the smelter, and imposing sulfur dioxide fume controls on that smelter. Parrish, *supra*, at 420-21 (discussing the Trail Smelter Arbitration (U.S. v. Can.) 3 R.I.A.A. 1905 (1938) ("Trail Smelter I"), further proceedings 3 R.I.A.A. 1938 (1941) ("Trail Smelter II")).

The inter-governmental structure that resolved the Trail Smelter dispute is still in existence today, with its chief mandate being to resolve trans-boundary environmental issues and related disputes between the United States and Canada. L.H. Legault, *The Roles of Law and*

Diplomacy in Dispute Resolution: The IJC as a Possible Model, 26 CAN.-U.S. L.J. 47, 50 (2000) (one of the IJC commissioners (Legault) noting that "[t]he fundamental mandate of the Commission, as reflected in the preamble to the Boundary Waters Treaty, is to prevent and resolve disputes between Canada and the United States"); *see also id.* at 52-53 (noting the IJC "has developed a rich body of practice in addressing transboundary water and environmental issues assigned to it under the Boundary Waters Treaty, the Great Lakes Water Quality Agreement [of 1978], and other agreements"); Parrish, *supra*, at 419 ("Using the IJC as a method for dispute resolution has been successful").

Similarly, the United States and Mexico have established a structure for resolving their trans-border environmental disputes – culminating in the La Paz Agreement of 1983. Under the Agreement, the governments of Mexico and the United States agreed to "cooperate in the field of environmental protection in the border area on the basis of equality, reciprocity and mutual benefit." La Paz Agreement, art. 1, Aug. 14, 1983, 35 U.S.T. at 2918. Out of the La Paz structure have grown other mechanisms for U.S.-Mexico government efforts to address transboundary pollution, such as the U.S.-Mexico Integrated Border Environmental Plan, which is a "broad program of cooperation between the Mexican and U.S. environmental agencies." Peter M. Emerson, et al., *Managing Air Quality in the Paso Del Norte Region, in Environmental Management on North America's Borders*, 137 (Richard Kiy & John D. Wirth eds., 1998). Another has been the more recent effort under the rubric of the Border 2012: U.S.-Mexico Environmental Program, a further effort of the two countries' environmental agencies to

increase governmental and stakeholder cooperation in addressing transboundary environmental issues. *See Border 2012: U.S.-Mexico Environmental Program*, http://www.epa.gov/usmexicoborder.

Surprisingly, the Ninth Circuit's decision completely ignores these agreements and mechanisms to resolve cross-border environmental issues. Its decision does not even *mention* the Boundary Waters Treaty, the International Joint Commission, the Trail Smelter proceedings, or *any* of the mechanisms the United States and Canada have utilized over the last 100 years to resolve transboundary environmental disputes.

The Ninth Circuit's decision is fundamentally at odds with the principles that have guided Canada and the U.S. on environmental matters to date. The Ninth Circuit's decision does not even acknowledge the Canadian government's strong objections to the litigation, and the troubling concept that U.S. environmental laws could be applied to Canadian businesses operating *solely and lawfully in Canada*.[2] The Ninth Circuit decision inexplicably ignores

[2] Indeed, "Canada sets its own environmental agenda, sets its own environmental standards, has its own body of laws that applies to both the regulation of operators like [Teck Cominco] and any remedial obligations associated with those operations[.]" Parrish, *supra*, at 407. Under the Ninth Circuit's ruling, "Canadian environmental policy – to the extent that it imposes a different standard or a different method of regulation – would be undermined as Canadian companies would feel compelled to follow U.S. laws." *Id.* at 406. And Canada's environmental approaches are indeed different – as many U.S. laws (including CERCLA, the Clean Air Act, the Clean Water Act, and others) have no nationwide Canadian analogues. David R. Boyd, *Unnatural Law: Rethinking Canadian Environmental Law and Policy* 229 (2003). Moreover, as a general rule, "Canada's Constitution places more power in provincial hands than the U.S. Constitution gives to the states" – and provinces similarly do not

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results never intended by Congress – a disruption of: the joint management of trans-border environmental issues; bilateral relations among U.S., Canada, and Mexico; certainty and stability in the economic and business climate; and timely and cooperative efforts to improve North America's environment for all citizens.

At the top of this brief, we noted that the issue is not *whether* trans-border environmental issues need to be dealt with (they do), but *how* to do so. The *how* will not be advanced if the Ninth Circuit's decision is allowed to stand.

CONCLUSION

For the foregoing reasons, the Court should grant Teck Cominco's Petition for a Writ of Certiorari.

Respectfully submitted,

Dated: May 2, 2007

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